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70-266

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN TATAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of corruptly promising to give land to an Internal Revenue Agent with intent to induce the agent to violate his duty, in violation of 18 U.S.C. 201(b). Petitioner was sentenced to 15 years' imprisonment. The court of appeals affirmed, *per curiam* (Pet. App. 1a-6a).

1. Petitioner claims that the entrapment issue was improperly handled by the district court and that the entrapment instructions were inappropriate and misleading. The relevant facts are set forth in the opinion

below (Pet. App. 1a–4a) and make clear that there was ample evidence (see Pet. App. 35a–44a) from which the jury could conclude that the bribe offer was not the "product of the creative activity of [law enforcement] officials", *Sorrells* v. *United States,* 287 U.S. 435, 451, but originated in the mind of petitioner.

Petitioner contends further that the issue of entrapment should be decided, not by the jury, but by the court. This contention has, however, been fully considered and rejected by this Court in *Sherman* v. *United States,* 356 U.S. 369, 376–377; see also *Masciale* v. *United States,* 356 U.S. 386; *Cazares-Ramirez* v. *United States,* 406 F. 2d 228, 230 (C.A. 5), certiorari denied, 397 U.S. 926; *Erwing* v. *United States,* 394 F. 2d 829, 830 (C.A. 9); *Martinez* v. *United States,* 373 F. 2d 810, 812 (C.A. 10).[1]

Petitioner offers no persuasive reasons for reexamination of the *Sherman* rule. *Jackson* v. *Denno,* 378 U.S. 368, on which petitioner relies, involved the different problem of the grave danger of jury prejudice unless the trial court makes a preliminary finding regarding the voluntariness of a confession.

2. After the jurors had deliberated approximately five hours, they sent the judge a note advising that they were at an impasse (Pet. App. 45a). The judge, over defense objection, then gave a charge based on *Allen* v. *United States,* 164 U.S. 492 (Pet. App. 46a–47a). The judge did not indicate that the jury had to reach a decision; he stated that it was "desirable" to do so if it

[1] When entrapment appears as a matter of law, as in *Sherman*, then, of course, the issue should not be submitted to the jury and the indictment should be dismissed by the trial judge.

was "possible", pointing out further that the decision of each juror should be "the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors" (Pet. App. 46a). This instruction is not at all comparable to that in *Jenkins* v. *United States,* 380 U.S. 445, 446, where the judge had unequivocally advised the jury that it had to reach a decision. As we have pointed out in a number of recent briefs in opposition, although some federal courts have adopted prospective modifications of the standard *Allen* charge, none has held that the fact that it was given constitutes reversible error. See *United States* v. *Wynn,* 415 F. 2d 135 (C.A. 10), certiorari denied, 397 U.S. 994; *United States* v. *Fioravanti,* 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States,* 396 U.S. 837; *United States* v. *Brown,* 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017.[2]

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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[2] Petitioner also claims the supplemental instructions were improper because the court supplemented the entrapment instructions by stating that there was "lawful" and "unlawful" entrapment. Notwithstanding this allegedly confusing terminology, the essence of the instruction properly stated the governing law (see Pet. App. 49a).

U.S. GOVERNMENT PRINTING OFFICE: 1971